IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CONFIRMATION CASE NO.2 OF 2005
(Reference made by Sessions Judge, Daman, Diu
and Dadra Nagar Haveli)

The State of Maharashtra ...Appellant.
(Original Complainant)

V/s

Anil alias Raju Namdeo Patil ...Respondent.
(Original Accused)

Smt. Usha Kejriwal, A.P.P. for the appellant - State.

Shri C.M. Kothari for the respondent.

ALONG WITH
CRIMINAL APPEAL NO. 182 OF 2005

Anil alias Raju Namdeo Patil ...Appellant
(Original Accused)

V/s

(1) Administration of Daman
and Diu, Daman

(2) The State of Maharashtra ...Respondents.
(Original Complainants)

Shri C.M. Kothari for the appellant.

Shri Girish R. Agrawal for respondent No.1.

Smt. Usha Kejriwal, APP for the respondent No.2.

CORAM: D.G. DESHPANDE &
V.M. KANADE, JJ.

DATE : 29TH NOVEMBER, 2005

JUDGMENT: (Per V.M. Kanade, J.)

1. Confirmation Case No.2 of 2005 has been referred by the Sessions Judge, Daman at Silvassa to this Court for confirmation of the death sentence which was

passed in Sessions Case No.6 of 2000 against the accused Anil alias Raju Namdeo Patil. The accused Raju has filed criminal appeal No.182 of 2005 challenging the judgment and order passed by the Sessions Judge in Sessions Case No. 6 of 2000. The accused is convicted for an offence punishable under section 364-A of the Indian Penal Code and sentenced to death for having committed the said offence. He is further convicted for the offence punishable under section 201 of the Indian Penal Code and sentenced to suffer five years' rigorous imprisonment and to pay fine of Rs 2000/- and in default to suffer rigorous imprisonment for one year. The under trial detention period of the accused from 07/08/2000 till 03/02/2005 was directed to be set off while computing the sentence for the offence under section 201 of the Indian Penal Code.

2. Initially, Shri M.K. Kocharekar, advocate was appointed from the amicus curaie panel, since the appellant was unable to engage an advocate. Thereafter Shri C.N. Kothari, Advocate filed his vakalatnama on behalf of the accused.

3. The facts in the present case disclose sordid tale of commission of an offence most foul and reveals the

extent to which a humanbeing can stoop to satisfy his greed to procure money. The gruesome nature of the crime and the diabolical manner in which it is executed poses a question, whether the author of such crime can ever be reformed and if death penalty is given in such a case, whether it would be justified irrespective of the fact whether it acts as deterrent or not.

4. Paras, a young boy of five years of age residing with his parents Smt Alpa and Shri Ashwin Shah at Udwada, went to his Coast Guard School on the morning of the 3/8/2000 alongwith his school bag, water bottle and tiffin. However, he did not return back. His father and his driver made frantic efforts to search him while going back to the School at about 2.30 P.M. which was the normal time when the school bus by which he travelled home used to drop him at a particular place near his house. In spite of desperate and frantic efforts made by his father in inquiring with the school bus driver, school teachers and other children who normally travel in the bus, there was no clue about the whereabout of Paras. A missing complaint was lodged at Daman Police Station which was routinely noted down by the Police without even demanding the photograph of the missing child. While,

the father of Paras who is a young entrepreneur and the owner of a factory which is situated in Daman was busy trying to locate his missing child, his mother was waiting in their house in the midst of ladies who had come from the neighbourhood to inquire about the missing child. At around 6.15 P.M. in the evening there was a phone call which was attended to by Alpa wife of Ashwin. Within a minute after she picked up the phone and listening to the person who was calling, she started weeping at which point their neighbour Khimjibhai picked up the phone and a person who spoke in Hindi told him that the boy was in their custody and a demand of Rs 25 lakhs was made as ransom amount for returning the child safely. Before any further inquiries could be made, the caller disconnected the call. Soon thereafter, Ashwin came home and he was informed about the phone call. On receiving this information, Ashwin went to the Police Station and lodged a complaint. Initially, the investigation was made by Sub-Inspector Rocha and, thereafter, the investigation was transferred to CPI Mr. Rosario.

5. During the course of investigation again few calls were received in the next two days and caller informed the parents of Paras to bring the ransom amount near Ankleshwar at a particular place in their Armada Car

and further instructions were given that only two persons should be there in the car and that no complaint should be filed with the police. The caller further informed them that a person would contact them and give them a code word "tambaku" and money should be handed over to the said person and within half an hour the boy would be returned safely to his parents. Accordingly, the police, on receiving this information, arranged a trap. Two persons went to Ankleshwar. However, nobody turned up to claim the ransom amount. Thereafter, Inspector Rosario inquired with Ashwin whether his present or past employees resided at Ankleshwar and, at that time, name of the person accused Raju was disclosed by Ashwin. Raju was arrested and his personal search was taken and his personal diary was seized. He, thereafter, disclosed his intention to show where the body of Paras was disposed of. Accordingly, in the presence of panchas, Raju took the police party along with panchas to an isolated place near a nalla and showed them the place where the body of Paras was thrown after it was burnt. The pieces of bones of the skull, lower jaw and other bones were seized in the presence of panchas after they were shown by accused Raju. After recovery of the remnants of the bones of Paras at the instance of the accused was made by Inspector Rosario, thereafter,

inquest panchanama was made. On 08/08/2000, the police again visited the spot along with the panchas and spot panchanama was made and further articles were found at the spot which were also seized under the panchanama viz. polythene sheet, a pair of black shoes, burnt pieces of cardboard and burnt pieces of clothes and other articles were seized in the presence of panchas. In the meantime, one Jagdish who was the Manager of the factory was also arrested and the police remand was taken of both the accused. A letter was written to the Medical Officer to give his opinion regarding the bones which were recovered from the scene of offence and the Medical Officer gave his opinion on 09/08/2000 that the bones tallied with the age of the deceased. He, however, opined that it was essential to have DNA test for establishing the identity of the victim. Accordingly the bones were sent to the DNA Finger Printing Laboratory at Hyderabad. The blood samples of both the parents were taken on 11/08/2000 and both these samples were sent for DNA analysis to Hyderabad.

6. During interrogation of Raju, it transpired that one Chhotu had used one DCM Toyota of his employer Chandrakant Dayabhai Patel for kidnapping Paras and the

involvement of Satish was disclosed. Accordingly, the police went to village Vavda in Taluka Amalner, District Jalgaon where further investigation was made and the statements of the relatives of two other persons Chhotu and Satish was recorded. During this time, Mr. Rosario received an information that the said Satish and Chhotu had committed suicide in a lodge at Sindkheda in District Dhule by consuming poison. They were taken to the hospital and at the time when they were admitted in the hospital Chhotu @ Dharamraj was alive. He died in the hospital after about half an hour after he was admitted and the other accused Satish was already dead. Their bodies were searched in the presence of panchas and one suicide note was found in the pocket of Satish.

7. Further investigation was made in respect of the owners of the two STD Booths from where the telephone calls were made. Register and the STD Rolls were attached

8. On 15/08/2000, custody of Raju was handed over to to judicial custody and, thereafter, on the next date i.e. on 16/08/2000, a request was made to the Chief Judicial Magistrate, Daman, for recording the confessional statement of the accused. Accordingly,

the confessional statement of the accused was recorded on 17/08/2000 and 18/08/2000. The Magistrate informed the accused of his rights and consequences of his confession and further questioned him whether he was making confession on duress or on inducement given by the police and the questions put by the Magistrate and the answers given by the accused were recorded personally by the Magistrate. Thereafter, 24 hours time was given to the accused to consider whether he still wanted to make a confession. Thereafter, on 18/08/2000, the confessional statement of the accused was recorded, who admitted having kidnapped Paras for the purpose of demanding ransom but stated that Paras was murdered by Chhotu @ Dharamraj and Satish.

9. Thereafter, the sketch of the scene of offence was prepared. The suicide note and the other specimen documents in the handwriting of Satish were sent to the Government Examiner for opinion to Hyderabad. On 27/ 10/2000, DNA report was received and the expert gave his opinion that from the examination and analysis of the bones and the blood samples, according to him, they were biologically related. Thereafter, charge-sheet was filed on 01/11/2000 and after the report of the hand-writing expert was received on 07/11/2000 and remnants were received from DNA

Laboratory Hyderabad on 24/11/2000, both these documents, were sent to the Court.

10. An application was made for deleting the name of Jagdish as an accused. The application was allowed. The charge was framed against the accused, who pleaded not guilty to the said charge. The prosecution examined 41 witnesses and also brought on record the documentary evidence. The accused did not examine himself or any other witness. The trial court, after perusing the evidence of the prosecution convicted the accused for the offence punishable under section 364-A and gave death sentence for having committed the said offence and, further, convicted him for an offence punishable under section 201 IPC for causing disappearance of the evidence and awarded five years' rigorous imprisonment for the said offence.

11. The trial court held that Paras had met with homicidal death after taking into consideration the recovery of the bones from the field which was done at the instance of the accused and from the report of the doctor and the DNA Finger Printing opinion given by the expert who had conducted the said analysis on the basis of the bones which were recovered and the blood samples which were given by the parents of Paras and,

further, from the articles and the burnt clothes which were recovered from the scene of offence and which were identified by the parents of the child. On the basis of this evidence and the fact that child was missing from the school, the trial court held that Paras had met with homicidal death. The trial court further relied on various circumstances such as recovery of bones of Paras and the articles of accused, confession made by the accused before the Magistrate, recovery of telephone diary of the accused, phone calls which were made by the accused from the STD Booth and the motive to extract ransom. On the basis of these circumstances, the trail court came to the conclusion that the prosecution has proved beyond reasonable doubt that the accused had committed the said offence of kidnapping and murder of Paras and, accordingly, sentenced the accused to be hanged by the neck till his death and, further, the sentence of five years for the offence punishable under section 201 and in view of the mandate given by section 366 of the Criminal Procedure Code sent the matter along with the proceedings for confirmation.

12. We have heard Shri Kothari the learned counsel appearing on behalf of the accused Shri Girish Agrawal learned Counsel, appearing on behalf the

Administration of Daman & Diu and the State of Maharashtra at length. We have given our anxious consideration to the submissions made on facts and the legal issues by both the respective counsel. Both the counsel have taken us through the judgment and order of the trial court as also the oral and documentary evidence adduced by the prosecution.

13. Chapter XXVIII of the Criminal Procedure Code lays down the procedure regarding submission on death sentence for confirmation. Perusal of sections 366 to 370 indicate that they have been incorporated to ensure that the entire oral and documentary evidence is placed before the High Court so as to ensure that before any final order is passed on the question of guilt or innocence of the accused, all this evidence is minutely scrutinized by the High Court with utmost care and caution. The intention of the Legislature is obvious that the offences where Sessions Court feels that the accused must be sentenced to death, such cases are scrutinized by the High Court afresh, after going through the oral and documentary evidence and independent findings are recorded on each and every aspect of the case so that the chances of the life of an innocent man being taken away or the man who has committed a heinous crime is not allowed to go away

scot-free are reduced.

14. The submissions made by the learned counsel appearing on behalf of the accused and the learned counsel appearing on behalf of the State are summarised briefly and these submissions shall, thereafter, be considered by us at the appropriate stage and our findings on the said submissions and on the evidence which is there on record, after considering the legal position, shall be dealt with at an appropriate place.

SUBMISSIONS:

15. The submissions, in brief, which are made by the learned counsel appearing on behalf of the appellants are as under:-

16. The learned Counsel appearing on behalf of the appellant has seriously attacked the manner and the method in which the investigation has been carried out by the Investigating Agency and it is submitted that the genesis of the crime has not surfaced due to the faulty investigation which has been made by the prosecution and, therefore, the accused is liable to be acquitted on that ground alone. Shri Kothari then

submitted that in a case which is based on unsatisfactory evidence, if there is a missing link in the chain of circumstances then the immediate result of this missing link would be that the chain would be incomplete and the benefit of that would go to the accused. He submitted that there were many missing links in the chain of circumstances in the present case and, therefore, the accused was liable to be acquitted. Shri Kothari, thereafter, strenuously urged before us that the confessions which was recorded by the Judicial Magistrate would not be relied upon as adequate safeguards have not been taken by the Judicial Magistrate as required under section 164 of the Criminal Procedure Code and as per guidelines laid down by the Apex Court and this Court while recording such confessional statement. He, therefore, submitted that this confessional statement has to be discarded in its entirety. He, thereafter, submitted that the suicide note had been rightly rejected by the trial court. He submitted that the said note even otherwise was not admissible under section 32 of the Evidence Act. He further submitted that the recovery of the bones from the scene of offence and of the articles at the instance of the accused could not be relied upon as the police were already aware of the said site and, therefore, the

recovery would not fall within the purview of section 27 of the said Act. He further submitted that no identification parade has been held of the accused in order to establish that he had kidnapped Paras from the School. He further submitted that the opinion given by DNA Expert could not be relied upon due to number of lacunae which were evident from the manner in which the test was done by him. He further submitted that the blood samples of the parents of the child had not been sealed before taking them to the DNA Test Laboratory. He submitted that the Investigating Officer had implicated the accused falsely in order to protect Jagdish whose name was deleted from the list of the accused. In support of the said submissions he relied on judgments which will be considered at the appropriate place.

17. The submissions, in brief, which are made by the learned Counsel appearing on behalf of the respondents are as under:-

18. The learned Counsel appearing on behalf of the respondents, on the other hand, submitted that the prosecution has proved beyond the reasonable doubt all the circumstances which clearly and unerringly pointed to the guilt of the accused. He submitted that the

accused was the past employee of the parents of the child Paras. He bore a grudge against his ex-employee and after removal from service, he had planned kidnapping of the child alongwith his friends for securing ransom amount. Accordingly, they had kidnapped the child and he was killed on the same day and even though they knew that the child was dead, ransom amount was demanded by posing that the child was safe and could be returned if the ransom amount was paid. The recovery of the bones of the child at the instance of the accused, the opinion given by the expert establishing that the bones belonged to the deceased Paras alongwith the confessional statement of the accused and the suicide note of the two other conspirators clearly establish that the accused had committed the said offence. He relied upon number of judgments which would be considered later on.

19. In order to prove its case, the prosecution has examined as many as 41 witnesses and it also further relied on the documentary evidence which was produced by the witnesses.

20. The prosecution has relied upon the following circumstances.

(1) Missing child.

(2) Ransom demand

(3) Police Complaint

(4) Arrest of Raju

(5) Seizure of diary

(6) Seizure of Raju's licence from deceased accused's Chhotu's house.

(7) Recovery of bones of child, at the instance of the accused.

(8) Other articles belonging to Paras found at the scene of offence i.e. burnt clothes, shoes.

(9) Other co-accused committed suicide and leave a suicide note claiming responsibility for committing the offence, blame accused Raju for the murder of Paras.

(10) Post-mortem of deceased co-accused confirms that the cause of death was due to consumption of poison.

(11) The Accused Raju makes a confessional statement admitting that he had kidnapped the child, but blaming the other co-accused for the murder of the child, admits disposal of dead body.

(12) DNA Finger Printing Report confirms that the bones recovered match the DNA of complainant Ashwin and his wife Alpa.

(13) Dr. Chand who performed post-mortem on the bones opines that they belong to a male child of five years of age.

(14) Handwriting expert gives opinion that the author of the suicide note was deceased co-accused Satish.

(15) Statement of STD booth owners that telephone calls demanding ransom made' from their booth.

(16) Extra judicial confession of accused.

(17) Motive.

21. In a case where the evidence is of circumstantial nature, while appreciating such evidence it is the duty of the court to be aware of the rules which have to be applied.

22. The Supreme Court in the case of Hanuman Govind Nargundkar and another vs. State of MP reported in **AIR 1952 SC 343** has observed in para 10 of its judgement as under:-

"10. .....

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead, itself to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far

complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused"....."

23. The law on the circumstantial evidence has been summarised in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra reported in **AIR 1984 SC 1622** in paras 150, 151 and 152 which read as under:-

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in

the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant Vs. State of Madhya Pradesh, 1952 SCR 1091 : (AIR 1952 SC 343). This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal vs. State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan J. has laid down in Hanumant's case (at pp. 435-46 of AIR) (supra):

. "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first

instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There

is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

"certainly", it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused,that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion, consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

24. In a recent judgment, the Supreme Court in the case of State of Haryana Vs. Jagbir Singh and another reported in **2003 CRI.L.J. 5054** has considered the conspectus of cases of circumstantial evidence and the ratio laid down by the Supreme Court in all these cases. Keeping in view the ratio laid down by the Supreme Court, we shall examine the circumstantial evidence on which reliance is placed by the prosecution.

25. We propose to evaluate the oral and documentary evidence and the legal position in respect of the various issues which are raised by both the parties particularly because the accused has denied even the factum of homicidal death. Firstly, we propose to reconstruct the commission of offence on the basis of the prosecution case which has emerged on the basis of

the oral and the documentary evidence which they have brought on record. Secondly, we propose to see whether on the basis of this evidence prosecution has proved that Paras had met with a homicidal death. Thirdly, we propose to examine various circumstances on which reliance has been placed by the prosecution to come to a conclusion whether they have been established beyond the reasonable doubt and, while doing so, consider factually as well as legally the position on each of the issues raised by both the parties and finally the question of sentence, if we hold that the accused has committed the said offence.

26. The accused Raju was working in the Company of P.W.22 - Ashwin Devraj Shah as a driver for three months i.e. from April, May and June, 2000. This has been stated by P.W.22 in his evidence and has not been disputed by the accused that he was not working as a driver with P.W.22. P.W. 21 - Smt. Alpa Ashwin Shah, wife of Ashwin Shah also has stated in her evidence that the accused was working as a driver between April, May and June, 2000. The fact that the accused was working as a driver of the parents of Paras has been established. P.W.8 - Vilas Gyaneshawar Patil in his evidence has stated that accused Raju and Satish had told him on 18/07/2000 that they had a plan

to kidnap Paras, son of Ashwin and demand ransom of Rs 5 lakhs. When P.W. 8 told both of them that he would inform their parents, they replied that they were just joking. Thus, the fact of state of mind of the accused and Satish three weeks before the commission of the offence has been brought on record. The accused, therefore, were meticulously planning the operation. Further, P.W. 21 - Smt. Alpa Shah, mother of Paras has stated in her evidence that 4 to 5 days before the incident, she had seen Raju loitering near their house. Though this fact was not informed by her to the police when her statement was recorded, she has explained that when her statement was recorded, she was not in a proper frame of mind and, therefore, this fact remained to be mentioned in her statement to the police. There is no reason to disbelieve this evidence of P.W. 21. When her statement was recorded, it is possible that she was not in a proper state of mind to narrate the entire facts. Further, since the identity of the accused was not known at the time when her statement was recorded, she may not have given any importance to the fact of seeing her previous driver loitering near her house. Thus, apart from preparation for commission of the offence, the accused Raju also was seen actively keeping a watch and taking further steps in the

preparation and planning of the offence of kidnapping.

27. On 03/08/2000, Paras, as usual, left his house to go to his School and had boarded the school bus and had attended the school. He, however, did not return back at the usual time and, therefore, father of Paras made inquiries at various places. However, Paras was not found. In the meantime, a telephone call was received at the house of P.W. 22 - Ashwin, demanding ransom of Rs 25 lakhs for release of Paras. He, therefore, lodged a complaint at the Daman Police Station on 03/08/2000. Before the father of Paras had lodged a complaint, one Coast Guard Official and one Jagdish had given a missing report of Paras and the Head Constable Tamboli had registered the said report. An offence of kidnapping was registered. On the same day, Investigating Officer Mr. Rocha received instructions from his superior to transfer the case to CPI Rosario. Accordingly, he handed over the case-papers to CPI Rosario on the same day. P.W. 41 - Rosario on 04/08/2000 recorded the statement of Smt. Alpa Ashwin Shah, Khimjibhai Sengar, Suresh Raghunath Mandovkar, Rohit Ratanji Walton, Mr. Gautam Asambha, B. Singh, Smt. Sushma Kulshretha, Raju Dhiraj Mangela and Nilesh Lallubhai Patel. P.W. 13 Smt. Sushma Kulshrestha, a teacher in the Coast Guard

School has deposed that Paras was in the school on 3/8/2000. P.W. 14 - Rohit Ratanji, Principal of the school has deposed that at about 4.30 p.m., one of their students was missing. P.W. 15 Nilesh Lalu Patel deposed that Paras was not there at the bus stop. On enquiring with other students, he was told that Paras was not in the bus alongwith them. P.W. 17 - Suresh, conductor of the Coast Guard Bus has stated that Paras did not get down at Udwada Station and only 3 students got down and the student absent was Paras. The prosecution, therefore, has proved the circumstance of Paras not travelling in the school bus, though his presence in the school was proved.

28. On 05/08/2000, information was received that the kidnapper had also given instructions that the complainant should proceed with cash towards Ankleshwar and to proceed towards Rajpipla road where one person would meet them at 1.00 a.M. in the morning and give the code word "tambaku". The kidnappers also warned the complainants that only two persons would proceed in the Armada Jeep and no information should be given to the police and after the code word was given by the person, the ransom amount should be given to the said person and that the child would be sent to them within half an hour. The

trap was arranged. However, the kidnappers did not turn up. On 06/08/2000, P.W. 40 - PSI Rocha received a phone call from AIGP, Daman, who was camping at Ankleshwar along with CPI Rosario to make search of the house of the accused Raju and Chhotu. Accordingly, P.W.40 went along with two panchas Dilip Rathod and Soma Patel and located the house of Chhotu which belonged to Soma Bhula. The room was locked. The lock was broken in the presence of panchas and certain articles were seized. One diary of 1999 and one personal memorandum note book in the name of the accused and three driving licenses, one in the name of Dhanraj D. Patil, one in the name of Anil Namdev Patil and one in the name of Nilesh Malchand were found and they were attached. Accordingly, 8 articles were seized and the panchanama was made.

29. Thereafter, AGIP Daman and P.W. 41 - CPI Rosario told P.W. 40 - PSI Rocha to find out the house of Raju and give his address of Ankleshwar. On the same day, Rocha went to the house of Raju. After they went to that place and kept watch, Raju came out and he was identified by P.W. 23 - Haresh, brother of P.W. 22 - Ashwin Shah. He was accordingly picked up for interrogation and was brought to Daman. The statement of Soma Bhula Patel was recorded. During

interrogation of Raju, he informed that the child was taken to Ankleshwar. However, the child was not found. Then he was taken to the house of the complainant at Udwada for identification. Till 07/08/2000, the child was not found and the police arrested Raju on 07/08/2000.

30. The personal search of Raju was made in the presence of panchas Mr. Kurshid Ismail Manjara and Mr. Tahir Modi and one diary was found which is produced at Exhibit 28 which was given article-9. In this diary, mobile number 9825125202 of Ashwin was written and one other mobile number 982496144 was also written.

31. On 07/08/2000, during interrogation of Raju, names of Jagdish, Chhotu and Satish also transpired. The accused Raju volunteered to show the place where the body of the child was disposed of. P.W. 41 - CPI Rosario secured the presence of panchas Jallauddin Mohamed Dali, B.D.O., Daman and John Bosco Machado. In the presence of these two panchas, Raju informed that he wanted to show the place where the body of Paras was disposed of and, accordingly the memorandum of accused was drawn in the Police Station.

32. The accused sat in the jeep and asked the driver to proceed towards Teen Batti and, finally, after the party reached Kachigam, he took them towards Kabra factory and asked them to stop the vehicle at the end of the kathca road. The accused then took them to the field towards east and after crossing the nalla, he showed the place where the naked child was thrown in the Nalla. Thereafter, he showed the place where the body of the child was hidden. This was a place where there was a pit hole near the bank of the nalla. Then the place where the body was burnt was pointed out by the accused which was the place in the open field where burnt card-board and ashes could be seen. Then the accused showed them the place where the upper portion of the body which was not completely burnt was thrown away in the nalla. The bones were recovered by one Clifford Coutinho, the Fire Brigade Staff, who removed two pieces of bones from the nalla. Other parts of the bones were also recovered from the field. Accordingly six pieces of bones having measurement of (i) 20’cm, (ii) 20’cm, (iii) 17 1/2 c.m. (iv) 14’cm, (v) 18’cm. (vi) 13’cm were all seized. Also the pieces of partly burnt hair were found and they were also seized. The photographs were taken by the photographer - Bhavsar. On 08/08/2000, the accused was again taken to the same place and the other

articles were found. The scene of offence panchanama was drawn at Exhibit 19 in the presence of panchas. The sketch of the scene of offence was prepared covered with the place where the blue coloured polythene sheet, one pair of black shoes, burnt pieces of cardboard and burnt pieces of clothes were attached. The other accused Jagdish was already arrested on 07/08/2000. The bones were sent for post-mortem and the opinion of the doctor Chand was obtained. Dr Chand - P.W. 35, after examining the bones, gave his opinion that the bones belong to a male child of five to six years. However, he suggested that the bones should be sent for DNA Finger Printing.

33. Accordingly, on 09/08/2000, these bones were sent for examination to Hyderabad for DNA Finger Printing and on 11/08/2000 the blood samples of P.W. 21 Alpa Ashwin Shah and P.W. 22 Ashwin Shah were collected by the authorized Medical Officer and he was sent to Hyderabad to the DNA Finger Printing Laboratory. On 11/08/2000 DCM Toyota in which the child was taken was attached. The supplementary statements of the parents of the child were recorded and the statement of photographer - Bhavsar was recorded. The statement of the owner of DCM Toyota Chandrakant Patel was

recorded and the statements of Dilip B. Rathod and Dinesh L. Rathod were also recorded.

34. On 21/8/2000 CPI Rosario went to Navapura in Maharashtra in search of two other accused where he recorded the statement of Vidya Vilas Patel, sister of the accused Satish and also of Bhasan Vilas Patil, son of Vidya. He also met Ukkad Nathu Patil son of Satish at village Vavda, Taluka Amalner, District Jalgaon who informed him that he had come to his house on 11/08/2000 and the brother of Satish viz. Ashok had come from Parola to see him. He stated that Satish and one another person left his house at 6.30 a.m. and informed him that they were going to Daman. Thereafter, Satish and Chhotu committed suicide at Sindkheda, District Dhule. PSI Mr. Loyed was deputed to go to Sindkheda and, thereafter, on search of the dead body a suicide note signed by Satish and Chhotu was attached. The inquest panchanama was made and the post-mortem was performed on the dead bodies. Thereafter, on 14//8/2000, the statements of booth owners Girish Khandubhai Desai, Ketan Rana, Gopal Tandel and Sayeed Musaji were recorded and the STD Rolls were seized.

35. The accused Raju expressed his desire to record a

confessional statement while he was in judicial custody and, therefore, he was taken to the Chief Judicial Magistrate, Daman. On 17/8/2000, the Chief Judicial Magistrate recorded the first part of the confession and, thereafter, again asked the accused to consider whether he still wanted to give confession. He was sent to judicial custody and was produced after 24 hours on 18/8/2000 and when he expressed his willingness to give his confessional statement, even after all the consequences of the confession were made known to the accused on 17/8/2000 and 18/8/2000 and even then when he insisted that his confessional statement be recorded, thereafter, his second part of the confession was recorded.

36. In the case of Bhagwan Singh Rana vs. The State of Haryana reported in **AIR 1976 1797** the Supreme Court has held that it is permissible to believe one part of a confessional statement and to disbelieve another, and it is enough that the whole of the confession is tendered in evidence so that it may be open to the Court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to prove its correctness. The Supreme Court, in the said case, relied upon the ratio laid down in the case of Nishi Kant Jha vs. State of Bihar

reported in **AIR 1969 SC 422**. The ratio of the aforesaid judgment squarely applies to the facts of the present case. The exculpatory part of the confession can be discarded and the inculpatory part of the evidence can be used as a strong piece of evidence against the accused.

37. It, however, cannot be forgotten that the said confession would be one factor to be taken into consideration alongwith all the facts proved in the case. The Privy Council in the case of Bhuboni Sahu vs. The King reported in **AIR(36) 1949 Privy Council 257** in para 9 has observed that the said confession be used as one of the circumstances and put into scale and weighed with other evidence and can only be used in support of other evidence and cannot make a foundation of a conviction.

38. The learned Counsel for the accused relied on the judgment of the Supreme Court in the case of Hanuman Govind, Nargundkar and another vs. State of MP, reported in **AIR 1952 SC 343**. The Supreme Court in the said case altered the finding of the High Court which was passed on part of the statement of the accused recorded under section 342 of the Old Act which is equivalent to section 313 of the New Act. In our

view, the ratio of the said case will not apply to the facts of the present case. Under section 342 of the Old Act, an adverse inference could be drawn from the statement made by the accused to the Court. Under the new section 313, such an adverse inference cannot be drawn. Moreover, in the present case, the confession of the accused is recorded by the Magistrate under section 164 of the Criminal Procedure Code and not under section 313. The ratio of the said case, therefore, will not apply to the facts of the present case.

39. On 13/09/2000, the documents in the handwriting of Satish were produced by Ashok, brother of deceased, and they were attached. These documents alongwith the suicide note were sent to the hand-writing expert who gave his opinion that the handwriting of the specimen and all other documents was of the same person. The DNA report was received on 27/10/2000 in which it was stated that the bones which were found at the site and the blood samples disclose that the they were related and, thereafter, charge-sheet was filed by the police.

40. From the sequence of events which have been proved by the various witnesses, in our view, it has been established that the child Paras had gone to the

School on 3/8/2000. He did not return from the school and did not travel in the school bus which normally used to drop him at his residence. The kidnappers made telephone call, seeking ransom on 3/8/2000 at 5.30 p.m., 9.00 p.m. and 9.30 p.m. The complaint was lodged by P.W. 22 - Ashwin on 3/8/2000 about his child being kidnapped. The accused, though he was interrogated gave false whereabout of the child at which places the child Paras was not found. He was, thereafter, arrested. After his arrest, he volunteered to show the place where the offence was committed and the dead body was disposed of. the bones of the child of five years were recovered from this place which fact was known only to the accused Raju and Dr. Chand gave his opinion that the bones appear to be that of a dead person between five and six years of age. The bones thereafter were sent for DNA test at Hyderabad alongwith the blood samples of the parents of Paras. The DNA report also confirmed the fact that the bones belonged to child Paras on the basis of DNA Finger Printing Test. PW 21 and PW 22 parents of Paras identified the clothes of the deceased Paras which were recovered from the scene of offence at the instance of the accused Raju. From this evidence, in our view, it has been established beyond the reasonable doubt that the child met with

homicidal death and was murdered and his remnants were disposed of at the place which was shown by the accused Raju. The circumstantial evidence clearly and unerringly points to the accused Anil alias Raju Patil for the commission of the offence of kidnapping and murder of Paras and the demand of ransom amount after the murder of the child and also the offence of destroying the evidence by trying to dispose of the dead body of Paras.

41. Shri Kothari, the learned Counsel appearing on behalf of the accused, has strenuously urged before us that the recovery of the bones cannot be treated as recovery under section 27 of the Evidence Act. He strenuously urged before us, after going through the evidence of panch witnesses that no reliance could be placed on the said evidence and the panchanama in respect of the recovery of the remnants of the child at the instance of the accused on two grounds; firstly, on the ground that the entire panchanama was over in a very short period of time which indicated that the panchanama was signed at the Police Station and secondly it was submitted that the police already were aware of this site which was evident from the fact that they had taken a Fire Brigade Officer viz. Clifford Coutinho - PW. 10 who had removed the bones

from the nalla. In support of the said submission, he relied upon the judgment of the Supreme Court reported in AIR 1956 page 217. We are unable to accept the submission made by the learned counsel appearing on behalf of the accused. The law in respect of the discovery of the fact at the instance of the accused under section 27 of the Evidence Act is quite well settled. The Supreme Court in the case of Pulukuri Kottaya and others vs Emperor reported in **1947 Privy Council**, page 67 has laid down in para 10 of its judgment as under:-

> "[10] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of

information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornament produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the

police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordship's view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or that past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied

> by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The ratio of the said judgment has been followed till today.

42. The provisions of section 27 of the Evidence Act are exception to the normal rule of inadmissibility of evidence of confession made by an accused while in police custody. The provision makes a fact actually discovered as a consequence of information while in custody admissible in evidence. If the article, stolen ornament or instrument of crime is discovered as a result of the information of given there is a guarantee that the information about the confession

made regarding the articles or crime cannot be false. The other confession given in the police custody, however, is inadmissible in evidence. In the present case, the bones which were found at the instance of the accused have been proved to be of the missing child Paras. Further, articles belonging to the child were also searched from the place shown by the accused. This recovery, therefore, at the instance of the accused is a strong piece of evidence which proves the involvement of the accused The Supreme Court in the case of State of Himachal Pradesh vs Jeet Singh reported in **AIR 1999 SC 1293** : (1999) 4 SCC 370 has held in paras 26 and 27 of its judgment as under:-

> "26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried on the

main road side or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disintered its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it (Pulukuri Kottaya v. Emperor, AIR 1947 PC 67). The said ratio has received unreserved approval of this Court in successive decisions. (Jaffar Hussain Dastagir v. State of Maharashtra, (1969) 2 SCC 872) : (AIR 1970 SC 1934), K.

Chinnaswamy Reddy v. State of Andhra Pradesh, AIR 1962 SC 1788, Earabhadrappa alias Krishnappa v. State of Karnataka, (1983) 2 SCC 330 : (AIR 1983 SC 446), Shamshul Kanwar v. State of U.P. (1995) 4 SCC 430 : (1995 AIR SCW 2741), State of Rajasthan v. Bhup Singh, (1997) 10 SCC 675."

The ratio of these judgments on which reliance is placed by the Counsel for the State is squarely applicable to the facts of the present case. The ratio of the judgement in the case of State of Haryana Vs. Jagbir Singh and another reported in **2003 CRI.L.J. 5054** on which the reliance has been placed by the learned counsel for the appellant will not apply to the facts of the present case. In the said case before the Supreme Court, Panchayat had given time to the accused to produce the boy dead or alive. He accepted that the dead body was buried in his compound. The accused dug the land and on seeking the leg of the dead body stopped digging and went to the police. Thereafter, the accused Jagbir made a disclosure statement. The Supreme Court in view of the above facts held that since the dead body was recovered on the basis of the information already

known, section 27 of the Evidence Act had no application. The Supreme Court relied on the same ratio laid down by it in the case of Aher Raja Khima Vs. State of Saurashtra reported in **AIR 1956 SC 217**. The facts in the present case are entirely different. The accused made disclosure and took the panchas and police to the place where the dead body was disposed off. The place was completely isolated and the bones which were thrown in a nalla were recovered at his instance. The submission of the appellant's counsel that the place was already known to the police has no basis.

43. In the present case the evidence of P.W. 16 Jallauddin Dali and P.W. 21 - John Machado discloses that the accused agreed to make voluntary statement and he asked the driver of the jeep to take him to the place of Kachigam and, from there, the accused Raju took them to the place where the bones were recovered from the nalla. The recovery panchanama dated 7/8/2000 which is at Exhibit-17 mentions that Raju disclosed that he had burnt the dead body and had hidden it in the pit hole. The clothes were later on burnt. The panchanama commenced at 16.00 hours and completed on 16.20 hours. Exhibit-17 is a panchanama regarding voluntary disclosure of the accused of the

place where the dead body was disposed of and, therefore, the said panchanama was over in about 20 minutes time. The first part of the panchanama pertains to the statement and this part was over in 20 minutes, whereas, thereafter the accused took them to the place where bones were scattered, after the dead body was burnt and the various parts of the body were recovered from that place. This panchanama commenced at 16.30 hours and concluded at 18.00 hours. Thus the submission of the learned counsel appearing on behalf of the appellant-accused that it was not possible to recover the bones in 20 minutes and, therefore, the said panchanama could not be relied upon, cannot be accepted. The panchanama, obviously, has been made in two parts. The first part was over in 20 minutes and the second part commenced at 16.35 hours and concluded at 18.00 hours. The second submission of the learned counsel appearing on behalf of the appellant-accused that the police already knew about the place and, therefore, the recovery cannot be construed to be recovery under section 27 of the Evidence Act also cannot be accepted. After the accused had disclosed at 16.10 hours that the body had been thrown in the nalla, Fire Brigade Officer P.W. 10 - Clifford Coutinho received information from Rosario that he was wanted at Kachigam. He has stated that he was in the

office at about 4.45 p.m. and, thereafter, telephone call was received. The first part of the panchanama commenced on 16.10 hours and not 16.30 hours. Thus there is nothing unusual if the Investigating Officer having come to know that the body was thrown in the nalla, had contacted the Fire Brigade Officer. The presence of the Fire Brigade Officer, therefore, does not indicate or mean that the police were already aware of the fact. After voluntary disclosure by accused Raju between 16.10 to 16.30 hours on 7/8/2000, the police felt that it would require the help of Fire Brigade Officer and, therefore, he was asked to come at Kachigam. It, therefore, cannot be said that the police were aware of the site. The ratio of the judgment on which the reliance is placed by the learned counsel appearing on behalf of the appellant will not be applicable to the facts of the present case. The recovery of the bones of the child Paras which have been proved to be belonging to Paras alone from the DNA Finger Printing Test which is a strong circumstance which establishes that the death of child Paras was homicidal and that the accused Raju was directly connected with kidnapping of the child, his murder and disposing of the dead body for the purpose of destroying the evidence.

44. The learned Counsel appearing on behalf of the appellant strenuously urged before us that reliance could not be placed on DNA Finger Printing Method which was adopted by the prosecution. He submitted that the blood samples which were taken to DNA Laboratory at Hyderabad, after they are taken by the Officer from the parents of Paras viz. P.W. 21 Alpa and P.W. 22 Ashwin, they were not sealed. He further invited our attention to the evidence of P.W. 39 - Dr. G.V. Rao. He submitted that the work-book had not been maintained by P.W. 29 - Sayeed Kusaji. He submitted that all these lacunae were fatal to the evidence of P.W. 29. The learned counsel for the appellant further invited our attention to the statement made by this witness in cross-examination and has submitted that the original copy of the report had not been submitted and only draft copy was produced on record by P.W. 39. He further pointed out that P.W. 39 had admitted that the mistake in draft was in respect of CDFD case number and the name of the sources and that CDFD Case No. 708 was typed in the draft instead of 748. On the basis of these lacunae, it was submitted that, therefore, the DNA report was not reliable and, therefore, the fact that the bones belonged to Paras was not proved beyond the reasonable doubt. It is not possible to accept the

submissions made by the learned counsel appearing on behalf of the appellant- accused. P.W. 39 has not stated that he has not maintained the work-book. He has stated that in his work-book, he has not mentioned whether skull or maxila was from source-A and that he had not mentioned that the sources B, D and E were not suitable for analysis. This statement does not indicate that no work-book was maintained by P.W. 39. Merely because P.W. 39 has not mentioned whether skull or maxila was from source B, D, and E would not by itself make the DNA report unreliable. It has been established that the DNA Finger Printing Method has a probative value of 99.9999 and it is the most conclusive and individual specific method for identification. Further, in his examination-in-chief, P.W. 39 who is an expert has stated that non-sealing of blood samples of Alpa Shah and Ashwin Shah will not have direct bearing on the results as the bones have matched in this case and that this showed that there was no contamination. In our view, there is no reason to discard the testimony of P.W. 39 who is the expert in the said field. Lastly, the learned counsel appearing on behalf of the appellant-accused has tried to discredit this witness by pointing out that this witness had been dismissed from service. However, in the cross-examination, P.W. 39 has stated that

despite the High Court stay order, the Director had issued a dismissal order and that the contempt petition was pending in the High Court. In our view, merely because order of dismissal was passed against this witness that by itself would not automatically render his testimony as an expert witness unreliable. Thus the submissions made by the learned Counsel appearing on behalf of the appellant-accused cannot be accepted. Section 45 of the Evidence Act lays down that the opinion of the expert is a relevant fact and is admissible in evidence. Unless it is established in the cross-examination that the opinion given by the expert is incorrect, the said evidence cannot be discarded on showing minor discrepancies such as non-production of original work-book.

45. The learned Counsel appearing on behalf of the appellant, thereafter, submitted that the only evidence against the present appellant was in the form of his own confession which was recorded by the Magistrate under section 164 of the Criminal Procedure Code. He submitted that in this statement the accused has stated that the child was murdered by Satish and Chhotu alias Dharamraj and, therefore, there was no evidence to connect the accused Raju with the murder of the child Paras. He submitted that, at the

highest, even if the said confessional statement is accepted, he would be liable to be punished for the offence of kidnapping and not for an offence of committing murder under section 364-A of the Indian Penal Code. He submitted that even in respect of the offence of kidnapping, the evidence in the form of confessional statement is a weak type of evidence and on the basis of this evidence alone, the accused cannot be convicted unless there was a material corroboration in the form of other evidence. The submissions made by the learned counsel appearing on behalf of the appellant cannot be accepted. In the present case, the Chief Judicial Magistrate has recorded the statement of the accused in two parts. The first part was recorded on 17/8/2000 and the second part was recorded on 18/8/2000. The Chief Judicial Magistrate had ensured that the accused was produced from the Judicial Custody and not from the Police Custody. The accused was remanded to Judicial Custody on 16th itself and, thereafter, on his own, he expressed his desire to record his confession. On 17th, the Chief Judicial Magistrate inquired whether the accused was giving the statement under coercion. He also inquired whether any inducement was offered by the police to him to give confession as desired by the prosecution. The accused informed the Magistrate that

no such inducement was offered and the police had not coerced him to record the statement. The Magistrate, thereafter, informed the accused that his statement would be used against him as an evidence. After recording all the answers to the questions which were put by the Magistrate, the Magistrate gave further time of 24 hours to the accused to calmly consider whether he wished to still confess. Accordingly, he was sent back to judicial custody on 17/8/2000 and he was produced from the judicial custody on 18/8/2000. Again on 18/8/2000, the Magistrate reiterated all the questions which were put to the accused on the earlier day and when he was thoroughly satisfied that the accused was voluntarily making confessional statement, he recorded the statement on oath which was given by the accused. Thus, the procedure which is required to be followed by the Magistrate had been duly complied with and he had assured that no police officer was present in the court room when the questions were asked to the accused on 17/8/2000 and on 18/8/2000. In our view, therefore, the objection raised by the counsel for the appellant-accused cannot be accepted. In our view, this is a substantive piece of evidence which clearly indicates that the accused had played a major role in preparation and actual execution of the plan to kidnap deceased Paras and ask for ransom,

after he was murdered on the very day on which he was kidnapped. Another factor which has to be noted is that the accused obviously appears to have decided to give confession after two co-accused Satish and Chhotu had committed suicide and had left their suicide note, stating therein that the accused had committed the murder of Paras. Obviously, thereafter, in order to save his own skin, the accused confessed the part of the conspiracy to kidnap Paras and demand ransom but put the blame on Satish and Chhotu alias Dharamraj who were already dead. This confession, in our view, is a substantial piece of evidence which shows the clear involvement of the accused in the entire act of conspiracy of kidnapping, murder and demanding of ransom amount thereafter.

46. The next circumstance on which the reliance has been placed by the prosecution is the suicide note which was found on the person of Satish who is the co-accused in this case. The learned Counsel appearing on behalf of the prosecution Shri Agrawal vehemently urged that the trial court had erred in discarding this suicide note on the ground that the provisions of section 30 of the Evidence Act are not attracted and, on that ground, discarded this piece of evidence. He submitted that the suicide note, though

may not be admissible under section 30 of the Evidence Act, was clearly admissible under section 32(1) of the Evidence Act and is related to the statement by the deceased regarding the circumstances which caused his death. The learned counsel appearing on behalf of the accused, on the other hand, vehemently opposed this submission. He submitted that the trial court had correctly discarded this piece of evidence as it did not fall within the four corners of section 30 of the Evidence Act. He submitted that even if the said suicide note was held to be admissible under section 32(1), no reliance could be placed on the suicide note in respect of the part where both the deceased had blamed Raju - accused herein for the murder of Paras. He submitted that, further, the manner in which the dead bodies of these two accused were found had not come on record and that the police have not produced register of the lodge where co-accused had alleged to have consumed the poison. He submitted that the Investigating Officer had not stated how the dead body of these two persons was made known to Investigating Officer Rosario. In our view, the submissions made by the learned Counsel appearing on behalf of the State will have to be accepted. The trial court, though it was right in coming to the conclusion that the provisions of section 30 were not attracted, it ought

to have held that the said suicide note was clearly admissible under section 32(1) of the Evidence Act. Under this section a written or verbal statements relating to the facts made by the person who is dead and is a statement of a person as to the cause of his death or to any circumstances of the transaction which resulted in his death is admissible in evidence.

Section 32 sub-clause (1) reads as under:-

> "32.....
>
> (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> . Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be nature of the proceeding in which the cause of death comes into question."

The legal position in this regard is quite well

settled and the suicide note also clearly falls within the purview of section 32(1) provided two essential requirements which are mentioned hereinabove are present in the said statement. In the case of Sharad Birdhichand Sarda vs State of Maharashtra reported in **AIR 1984 SC 1622**, the Supreme Court in its judgment in para 21 has held as under:-

> "21. Thus, from a view of the authorities mentioned above and the clear language of S. 32 (1) of the Evidence Act, the following propositions emerge :-
>
> (1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of S. 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under S. 32.

(3) The second part of Cl. (1) of S. 32 is

yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valuless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time

alone in such cases would not make the statement irrelevant."

The said suicide note, therefore, in our view, is clearly admissible in evidence under section 32(1) of the Evidence Act and clearly establishes the case of murder against the accused Raju. It has to be noted that Satish and Chhotu committed suicide after commission of the offence as they were god-fearing persons and repented after having committed the said offence. They had also confessed to their near relatives and friends that three of them had committed the said offence. Both these persons had stated in the suicide note that both of them alongwith Raju alone were responsible for the commission of the said offence and, therefore, implored the police not to involve any third person in the offence, meaning thereby that Jagdish who was arrested by the police was not involved in the offence. They further stated that Raju alone had committed the murder of child Paras. A dying declaration or a suicide note is made admissible in evidence because it is accepted by law that the person who is about to die and is going to face his maker and would be no more connected with the

mundane world, has no reason to make false statement before dying. This is amply demonstrated in the suicide note. It is stated in the suicide note that being god-fearing persons they had repented the heinous crime which was committed and to which they had been party alongwith the accused Raju. They clearly stated that no one else is involved in the offence and lastly, they stated that Raju alone had murdered the child. In our view, this suicide note clearly names the accused and this is a strong evidence which proves his involvement in the entire episode from the beginning to the end. This suicide note alongwith the other evidence clearly exclude the possibility of innocence of the accused Raju. From the evidence it has come on record that P.W. 41 - Rosario had informed Parola Police Station that if they came to know about the whereabout of Satish and Chhotu alias Dharamraj, he should be immediately informed. Satish and Chhotu were brought to the hospital and at that time Chhotu was still alive and the efforts were made to save him. However, the doctor did not succeed in saving the life of Chhotu alias Dharamraj. The suicide note was recovered from the clothes of Satish in the presence of panchas. The post-mortem was performed on the dead bodies and the doctor gave his opinion that they had consumed poison.

The panchanama was made of the room where the accused were staying and the one litre Can of indoselfun was found along with 180 ml bottle of liquor and bottle of limca. There were stains of vomiting all over the room. Thus the submission of the learned counsel for the accused that the suicide note is a got up evidence, cannot be accepted. This suicide note was further sent to handwriting expert P.W. 34 - Mr. Narendrasingh Rajendra Singh and after comparing with the handwriting of Satish from the various material which was supplied by his brother, gave his opinion that it was in the same handwriting and, therefore, the opinion that the letter had been written by Satish and it was signed by Satish and Chhotu alias Dharamraj will have to be accepted. In our view, police have conclusively established that the suicide note was written by two co-accused before their death and in which the circumstances leading to the death and the transaction because of which suicide has taken place also was mentioned. The submission, therefore, of the learned counsel for the appellant - accused cannot be accepted.

47. Another circumstance on which reliance is placed by the prosecution is that the recovery of the clothes, shoes and other articles from the scene of

offence, Mr. Dali - PW 2 and Mr. Machado - P.W.3 have stated in their evidence that after the bones of missing child were recovered at the instance of the accused on 7/8/2000, then again on 8/8/2000, they were called at the scene of offence and the accused was present and from the said site white and blue coloured burnt clothes were attached, a pair of burnt shoes was also found and further pieces of card board and polythene sheet were seized. These articles were identified by these two witnesses as articles 17 to 20. They have stated that the scene of offence panchanama Exhibit-19 was drawn in their presence and Mr. Rosario also got the sketch prepared and which is proved at Exhibit-20. Another sketch drawn by the architect at Exhibit-37 was proved by Mr. Jayesh Damania. Both sketches and panchanama show the exact factual position of the spot. The burnt pieces of cloth and the shoes have been identified by P.W.21 and P.W. 22 Alpa Shah and Ashwin Shah to be the same clothes which the deceased Paras was wearing when he went to the school on 3rd. Apart from this evidence, the photographer Pradeep Bhavsar - PW 27 has identified the photographs as also negatives at Article 32 and positives at Article 31 regarding the scene of offence. The recovery of these articles from the place which was shown to be the place of scene of

offence by the accused on 7/8/2000 i.e. on the earlier day fortifies the case of the prosecution that the offence was committed at the said place and the naked body of the young child of five years of age Paras was thrown in the nalla and, thereafter, it was burnt on the next day. From the sketch which is prepared at Exhibit-20 and Exhibit-37 it can be seen that the said place is an isolated place, far away from the village and the scene of offence panchanama discloses that the nalla in which the body as thrown and in which it drowned was a nalla full of chemical waste and was black and green in colour.

48. Another strong circumstance on which reliance is placed by the prosecution is the recovery of telephone diary from the accused and the recovery of three licenses from room No.4 of the landlord Soman. In this diary, mobile number of Ashwin Shah - PW 22 and Haresh Shah - PW 23 and the other important telephone numbers were written in the handwriting of the accused. This diary was recovered when the personal search of the accused was taken. The learned Counsel appearing on behalf of the accused has vehemently attacked the manner in which the said diary was produced by the prosecution. It is submitted that the said diary was subsequently manipulated. It is no

doubt true that initially the Article 9 was seized in the presence of Tahir Modi - PW 6 and the arrest panchanama at Exhibit 28 was drawn in his presence. He has stated that this telephone diary with phone numbers and visiting card of some Company situated at Bhimapore were found. He identified that telephone diary at Article-9. In cross-examination, however, it was shown that the article 9 was, in fact, a diary of Jagdish. Thereafter, this witness was again recalled on the application filed by the prosecution and an order was passed at Exhibit-112 and Article 27-A which was a diary of the accused was shown to Tahir Modi who admitted that this was the same diary which was seized from the personal search of the accused - Raju. It is no doubt true that the Investigating Officer appears to have committed a bonafide mistake in respect of the said telephone diary and alongwith the charge-sheet the diary of Jagdish was wrongly produced and, thereafter, when the mistake was noticed, Article 27-A was allowed to be produced through P.W. 6 - Tahir Modi. In our view, though there is a mistake committed by the Investigating Officer, it appears to be a bonafide mistake. This can be seen from the fact that Exhibit-28 which was the panchanama of arrest of the accused gives description of the diary which is seized. In this panchanama dated 7/8/2000, regarding

telephone diary it is stated as follows.

> "In his personal search we found telephone index diary, containing pages from serial no. 1 to 40 wherein at pages 2, 5, 8, 9, 13, 14, 17, 20, 22, 25, 29, 32, 33 and 34 there are written some telephone numbers. At page No.5 has also the mobile phone of Ashwin bhai 9825125202 is written and at last cover page we see phone number 982496144. The said telephone diary is having one visiting card of Arkay Plastic Industries, Bhimpore. The above articles are attached under panchanama for the purpose of evidence."

The article 27-A completely tallies with the said notings which are made in the panchanama. We are thus of the view that the mistake was committed by the Investigating Agency and it was a bonafide mistake and that does not dilute the evidentiary value of the recovery of the telephone diary from the personal search of the accused. The submissions of the learned counsel appearing on behalf of the accused that the police has manipulated the telephone diary cannot be accepted.

49. The next circumstance is regarding the recovery of three licenses from the room of Chhotu alias Dharamraj, the deceased co-accused who was residing in the house of Soma Bhula. The prosecution relied on the evidence of Dilip Bhika Rathod - P.W.1, Soma Patel - P.W.4, Soma Bhula Radka - PW 12 and Investigating Officer CPI Mr Rozario - P.W.41. From the room three motor driving licenses; one belonging to the deceased co-accused Chhotu and the other belonging to the accused Raju - Article-7 and third one belonging to another person were recovered. The recovery of motor driving licence of Raju from the house of Chhotu indicates intimate friendly relations between the two and this further corroborates the prosecution case in respect of the commission of the offence by the accused Raju along with Chhotu and Satish.

50. The prosecution has also relied on extra judicial confession made by the deceased co-accused Satish to his brother Ashok .S. Patil who is examined as P.W. 38. Ashok has stated in his evidence that he met his brother at village Vavde at the house of his maternal aunt and one Chhotu was also present with him. At that time, Satish told him that Raju had brought a child in rickshaw from school and then three of them had taken the child to some place in tempo. Satish

told him that they took the child in forest where Raju killed that child. Satish further told Ashok that Raju asked him to demand money from Ashwin Seth on telephone. After Satish informed this to Ashok - P.W. 38, he was advised by Ashok to surrender before Daman Police. The counsel appearing on behalf of the appellant has assailed this evidence on the ground that the extra judicial confession was a weak type of evidence. It did not fall within the four corners of section 30 of the Evidence Act and that the trial court had correctly discarded the said evidence. On the other hand, the learned counsel appearing on behalf of the State has submitted that Ashok who was the real brother of the co-accused Satish had no reason to implicate his own brother, Chhotu and accused Raju. In our view, this would be an additional circumstance in favour of the prosecution as there is no reason why Ashok who is the real brother of Satish had any reason to implicate his own brother, Chhotu and the accused Raju. Admittedly, the deceased Satish and Chhotu were residing in Jalgaon District in the State of Maharashtra and, therefore, the police had no control over the relatives of the deceased Satish. P.W. 8 also has stated that Satish and Raju had told him in the month of July 2000 that they intended to kidnap the son of Ashwinseth. In our

view, therefore, this circumstance further corroborates the case of the prosecution against the accused.

51. The last circumstance is the motive for the commission of offence. This has been established by the prosecution by examining P.W. 21 - Alpa Shah, P.W. 22 - Ashwin Shah, P.W. 23 - Haresh Shah, P.W. 19 - Khimjibhai Sengar who attended the telephone calls of the kidnappers. P.W. 8 - Vilas Patil has also stated that Satish and Raju had informed him in the month of July that they had planned to kidnap the son of Ashwinseth and demand ransom. Further, in the confessional statement, the accused - Raju also has, in terms, stated that they had hatched a plan of kidnapping Paras and demand ransom. Though STD booth owners have been examined, it is difficult to rely on the seizure of the STD Rolls from them. It has not been established by the prosecution that the accused Raju or Chhotu or Satish had made telephone calls from this booth as no identification parade of Raju has been held, nor the dead bodies of Satish and Chhotu were shown to the STD owners to ascertain whether they had made the phone calls. However, the fact remains that in confessional statement Raju has admitted that they had decided to kidnap Paras and demand ransom.

In the suicide note which was written by both the deceased co-accused also they have admitted that they had hatched a plan of kidnapping Paras and demand ransom. The fact that the ransom was demanded has been established from the evidence of Khimjibhai Sengar - P.W. 19, Smt. Alpa Ashwin Shah - P.W. 21, Haresh Shah - P.W. 23, Girish Desai - P.W. 25 and Ketankumar Rana - P.W. 26. In our view, therefore, this is a strong circumstance which has been established against the accused Raju. One additional factor which can be inferred from the confessional statement of the accused Raju is that, in his statement, he states that at one occasion when he was serving as a driver with Ashwin Shah, his parents had come from his native place and, therefore, he wanted a holiday. The employer, however, had refused to grant him the holiday and, thereafter, on another occasion also his parents had come and he had requested for holiday. However, on that occasion he had to leave with his parents back to his native place. From this evidence, it appears that, apart from having a motive to demand ransom, the accused also bore a grudge against his employer Ashwin Shah for not allowing him to live in the company of his father and mother.

52. The learned Counsel appearing on behalf of the

State has relied on the judgement of the Division Bench of this Court in the case of Ravi Ochhu Tyanwar Vs. State of Maharashtra, reported in **2005 ALL MR (Cri) 31**. The Division Bench of this Court relying on the judgment of the Apex Court in the case of Kavita Vs. Tamil Nadu reported in AIR 1980 S.C. 247, observed that there was no bar of convicting the accused on the basis of extra judicial confession. The Supreme Court in the case of Kavita (supra) of which reference was made by the Division Bench, observed that though extra judicial confession is a weak piece of evidence, its value must be established by the veracity of the witness whom it was made and conviction can be made on extra judicial confession. The learned counsel appearing on behalf of the respondent No.1 relied upon the judgment of the Supreme Court in the case of State of M.P. through C.B.I. etc. vs. Paltan Mallah and Ors. etc. reported in **2005(1) Supreme 372** where the Supreme Court in para 18 of the said judgment has observed that the extra judicial confession made by the co-accused was admissible only as a corroborative piece of evidence. It further observed that there cannot be conviction based on such extra judicial confession. In the present case, the extra judicial confession has been made to the brother and relative

of the co-accused deceased Satish. There is absolutely no reason why these two witnesses would involve the accused and the other two deceased co-accused. The extra judicial confession, therefore, is an important circumstance connecting the chain of the circumstances. The learned Counsel appearing on behalf of respondent No.1 further relied upon the Division Bench Judgment of this Court in the case of Bhimrao Harbaji Gedam Vs. State of Maharashtra reported in **2001 CRI.L.J. 4920**. In the said case, Division Bench of this Court has considered the maxim "Nemo moriturus praesumuntur mentiri" which is the principle behind acceptance of dying declaration which means that the man will not meet his maker with a lie in his mouth and, therefore, the dying declaration or a suicide note is treated as a substantive piece of evidence. In the present case, it is no doubt true that there have been lapses in the investigation. The prosecution has not held the identification parade of the accused for the purpose of giving an opportunity to the school teacher, principal and other students in the school to establish that the accused had kidnapped Paras from the school. However, in view of the confession made by the accused, the said fact of kidnapping has been established by the prosecution. It is no doubt true that the circumstances relied upon

must be found to have been established fully and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. The Supreme Court in the case of Pawan Kumar Vs. State of Haryana reported in **2000 ALL MR (Cri) 1220** in para 2 of its judgment has observed as under:-

"2.....

.....In any event, on the availability of two inferences, the one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting however, noting the observations of this Court in the case of **State of U.P. v. Ashok Kumar Srivastava, AIR 1992 SC 840** wherein this Court in paragraph 9 of the report observed:-

"The Court has, time out of number, observed that.....

.....But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however-far-fetched and fanciful it might be. Nor does it mean that prosecution

evidence must be rejected on the slightest doubt because the law permits rejection if the doubts is reasonable and not otherwise...."

53. In the present case, the accused was charged by the trial court for an offence punishable under section 364 read with section 34 of the Indian Penal Code and section 302 read with section 34 of the Indian Penal Code and section 201 of the Indian Penal Code. However, while convicting the accused, the trial court convicted him under section 364-A of the Indian Penal Code. The prosecution case against the accused has been specific that he alongwith the other deceased co-accused had kidnapped Paras and had murdered him and had demanded ransom amount from his parents and after murdering the child, they had caused the disappearance of his body. Section 364-A which was introduced by the amendment Act No. 42 of 1993 made the offence of kidnapping for ransom a separate offence. The combined charge of 302 read with section 34 and 364 framed against the accused is equivalent to charge under section 364-A. The penalty for offence punishable under section 302 and section 364-A is death or imprisonment for life.

54. Section 221 of the Criminal Procedure Code

empowers the Court to convict the accused of the offence which he has shown to have been committed although he was not charged with it. Section 221 of the Criminal Procedure Code prescribes that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once ; or he may be charged in the alternative with having committed some one of the said offences. Sub-clause (2) of section 221 of Cr.P.C. empowers the Court to convict the accused for an offence with which he was not charged and from the evidence it appears that he had committed different offence even though he was not charged with it. In the present case, no prejudice is caused to the accused. The offence under section 364-A of the Indian Penal Code which is an offence of kidnapping for ransom is identical to the combined charge which is framed against the accused. Further, the sentence in the combined charge for the offence charged against the accused and the sentence which is awarded for the offence which is said to have been committed by him is the same. The offence of kidnapping for ransom is on the increase and, therefore, section 364-A was inserted or added in the

Indian Penal Code. It was noticed that the offences of this particularly category are on the increase. Section 364A, in our view, is applicable if ransom amount is asked from an individual person which is evident from the wording of the section which says that if the demand for ransom is made from "the Government or any foreign State of international and inter governmental organization or any other person"..... Thus, in our view, even individual person is included if a demand for ransom is made by the accused. Even otherwise, considering the evidence on record, in our view, prosecution has proved the offence with which the accused has been charged viz. section 364 read with section 302 and section 201 of the Indian Penal Code. The trial court, therefore, in our view has not erred in convicting the accused under section 364-A of the Indian Penal Code.

55. All the circumstantial evidence discussed hereinabove leads unerringly only to one conclusion that the accused along with other two deceased co-accused had kidnapped Paras from the school bus and, thereafter, the accused Raju had murdered him and then his body was disposed of and, thereafter, demand for ransom was made from Ashwinseth - PW 22, knowing fully well that the child Paras was already dead. The

prosecution, in our view, has established all the chain of circumstances and it has proved beyond the reasonable doubt that the said offence was committed by the accused - appellant herein.

56. The matter was kept for judgment on 23/11/2005. However, on that day, we again heard the counsel appearing on behalf of the accused and the prosecution on the point of sentence, after having reached the conclusion that the accused was liable to be convicted. We have heard both the counsel at length who have relied upon number of judgments and have rendered their written compilation of judgments.

57. The trial court has made reference to this court as per the mandate given by section 366 for confirmation of the death sentence awarded to the accused Raju. The law on the point of awarding death sentence is quite well settled. Sub-clause (3) of section 354 which was inserted by the Cr.P.C. Act of 1973 imposes an obligation on the court to record special reasons in the event the Court felt that death sentence should be awarded. This was clearly a departure from the general rule and as a result of introduction of the said clause, in a case where sentence was death or imprisonment for life, in that

case death sentence became exception and the sentence of imprisonment for life was to be generally awarded.

58. The Supreme Court right from in the case of Bachan Singh and others vs. The State of Punjab and others reported in **1980 SC 1355** has laid down that only in rarest of rare cases the death sentence should be awarded. The Supreme Court in catena of cases has laid down categories of rarest of rare cases in which death penalty should be awarded. The Supreme Court also laid down various mitigating and aggravating circumstances which have to be taken into consideration while imposing the sentence. The learned Counsel appearing on behalf of the accused has relied on the following judgment in the case of Amit alias Ammu vs State of Maharashtra reported in **2003 Cr.L.J 3873.** He further relied on the judgment in the case of Surendra Pal Shivbalakpal vs State of Gujarat reported in **2004 Cr.L.J. page 4642.** He further relied on the judgment of the Supreme Court in the case of Ediga Anamma vs State of Andhra Pradesh reported in **1974 SCC (Cri) page 479.** He also relied upon the judgment of the Andhra Pradesh High Court in the case of The Public Prosecutor, High Court of A.P. Vs. Pothuraju Narasimha Rao reported in **2003 Cr.L.J. NOC 229 (ANDH. PRA) = (2003) 1 Andh LT (cri) 438.**

The learned Counsel also relied on judgment of the SC in the case of Subhash Ramkumar Bind @ Vakil and another vs. State of Maharashtra reported in **2003 Cr.L.J. 443.**

59. The learned Counsel appearing on behalf of the State has relied upon the following judgments in support of his submissions:-

2004 (1) Bom.C.R. (Cri.) 321

(State of Maharashtra Vs. Rahul)

AIR 2003 S.C. 3915

Dayanidhi Bisol Vs. State of Orissa

AIR 2000 S.C. 1691

State of Maharashtra

v/s

Damu Gopinath Shinde.

AIR 1999 S.C. 1860

Jai Kumar V/s. State of M.P.

AIR 1985 S.C. 82

Henry Westmuller Roberts

v/s

60. After having given our anxious consideration to the submissions made by the learned counsel appearing on behalf of the accused and the Counsel for the State we are of the view that this is one of the rarest of the rare cases where death penalty awarded by the trial court should be confirmed.

61. In the present case crime which has been committed by the accused and the manner in which it is committed by the accused shows complete depravity and perversity of the mind, apart from reflecting the extent to which the accused has stooped down to make a quick buck.

62. The facts themselves are eloquent. The accused was unemployed. He was given employment by P.W.22 - Ashwin Shah. He worked with him for a period of three months. He was acquainted with the family of his employer i.e. his wife P.W. 21 - Alpa Shah and his five years son Paras. He was also aware of the financial position of P.W. 22 - Ashwin Shah and the Car which was owned by him. He was removed from the job after three months, possibly because of his

unsatisfactory performance. He appears to have bore a grudge against his employer and his family. This is reflected from his own confession which he has given voluntarily to the Judicial Magistrate. In his confession he has stated that on one occasion his father had come to meet him from his native place and he had asked for leave from him employer. However, the leave was not granted. Thereafter, his parents had again come to him and, at that time, he had to go back with his parents to his native place. This statement in his confession shows that he had a grudge against P.W. 22 - Ashwin Shah for not allowing him to meet his father who had come to meet him. Further, it can be seen that P.W.8 - Vilas Gyaneshwar Patil who was known to the accused and to the other deceased co-accused - Satish, has stated in his evidence that in the month of July 1999, the accused - Raju and the co-accused Satish had told him about their plan to kidnap Paras and demand ransom. Thus it appears that the crime has been committed in premeditated manner after giving thoughtful consideration to various aspects. What really shocks the conscience of the Court is the fact that the evidence on record shows that the accused had already planned to kidnap the child, kill him and, thereafter, demand ransom from P.W. 22 - Ashwin Shah by giving false hope to him

that if the ransom amount is paid, the child would be returned safely within a short time; the idea being to kidnap and murder the child, extract money from his ex-employer and to give him false hope and to further traumatise him that the child was still alive.

63. We have already held in detail and have given reasons stating how the prosecution has established beyond the reasonable doubt that the accused has committed the said offence. In the case of State of U.P. Vs. Satish reported in **2005 AIR SCW 905**, the Supreme Court reversed the order of acquittal passed by the High Court and awarded death sentence to the accused. In para 25 of its judgment, the Supreme Court has observed as under:-

> "25.....
> .....The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused

has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not....."

The Apex Court further in para 27 of its judgment in the case of Satish (supra) has observed as under:-

"27.....

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holder of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances.

(1).....

(2).....

(3).....

(4).....

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm

person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

....."

In the said case also, the victim was a young girl of six years of age who had gone to school but did not return back and she was found dead in sugar-cane field. The victim had been raped and then throttled. The ratio of the said judgment in the case of Satish (supra), therefore, would squarely apply to the facts of the present case. In the case of Henry Westmuller Roberts etc. v. State of Assam, etc. reported in **AIR 1985 SC 823** also the facts were identical with the facts of the present case. In the said case, one Henry, Sunil, Naresh and Anil entered into conspiracy of kidnapping the minor children with a view to extract ransom and, accordingly, kidnapped Sanjay who was about 9 years old and, thereafter, murdered him and then demanded ransom from his father by making the father believe that the boy was alive and would be returned to him if he paid the ransom. The Supreme Court confirmed the death sentence awarded by the trial court and confirmed by the High Court. The said

case also was based on circumstantial evidence. The ratio of the said judgment in the case of Henry (supra) also squarely applies to the facts of the present case. In the case of Sushil Murmu vs. State of Jharkhand reported in **AIR 2004 SC 394**, the death penalty confirmed by the High Court was confirmed by the Supreme Court. In this case a child of 9 years of age was sacrificed before a deity by the appellant for his own prosperity.

64. In view of the ratio of the aforesaid judgments coupled with the law laid down in the case of Bhagwan Singh Rana vs. The State of Haryana reported in **AIR 1976 SC 1797** and in the case of Machhi Singh and others vs State of Punjab reported in **AIR 1983 SC 957**, we are of the view that the present case of kidnapping, to extract ransom and causing death is a rarest of rare cases. There is considerable increase in number of such crimes. The young unemployed people are using this method as a short cut to become rich and, therefore, sentence has to be deterrent so that the proper message is given to the people who contemplate committing such offence so that they would think hundred times before embarking on this journey of committing such ghastly crime. There are practically no mitigating circumstances in the present

case except the fact that the accused was 20 years of age when he committed the said offence. However, aggravating factors outweigh this mitigating circumstance and, therefore, we are of the view that the sentence of death has to be imposed on the accused and no leniency whatsoever is to be shown.

65. The cases on which the reliance is placed by the learned Counsel appearing on behalf of the accused can be distinguished. In the case of Amit alias Ammu vs. State of Maharashtra reported in **2003 CRI.L.J. 3873** the accused has committed an offence of rape and murder of a young girl of about 12 yeas of age. The Supreme Court, however, in the said case, after considering the cumulative facts and circumstances of the case the Supreme Court did not think that the case fell in the category of rarest of rare cases. Similarly in the case of Surendra Pal Shivbalakpal vs. State of Gujarat reported in **2004 CRI.L.J. 4642** also the accused was found guilty of the offence of kidnapping, rape and murder of the minor girl and in the said case, the Apex Court observed that the case did not fell in the category of rarest of the rare cases. The facts in both the abovementioned cases on which reliance has been placed by the learned Counsel for the accused were different. In the said cases the

child was raped and murdered. In the present case, however, the child was kidnapped for ransom. The child was immediately killed, after he was kidnapped and, thereafter, ransom was demanded. The facts in the aforesaid cases, therefore, are entirely different.

66. In the case of Ediga Anamma Vs. State of Andhra Pradesh reported in **1974 SCC (Cri) 479**, a jealous mistress had killed her opponent who was also having affair with her paramour and, in that process, killed the child of the opponent also. The Supreme Court in the said case observed that since the death sentence was hanging over her head for a period of more than 2 years, it felt that the death sentence on that count should be reduced into imprisonment for life. The ratio of the said judgment cannot be applied to the facts of the present case.

67. In view of the above, the judgments on which the reliance is placed by the learned counsel appearing on behalf of the appellant-accused cannot be relied upon.

68. In the result, the following order is passed:-

O R D E R

(i) In the result, the appeal filed by the accused being Criminal Appeal No. 182 of 2005 is dismissed.

(ii) The death sentence awarded by the trial court in Sessions Case No.6 of 2000 by the Judgment and Order dated 04/02/2005 for the offence punishable under section 364-A of the Indian Penal Code is confirmed against the accused Anil alias Raju Namdev Patil, resident of village Shevge, Taluka Parola, District Jalgaon, Maharashtra State.

(iii) The accused Anil alias Raju Namdev Patil is further convicted for the offence punishable under section 201 of the Indian Penal Code and sentenced to suffer five years' rigorous imprisonment and to pay fine of Rs 2000/- and in default of payment of fine, to further suffer rigorous imprisonment for one year.

(iv) The under trial detention period of the accused from 07/08/2000 till disposal of this appeal shall be given set off while computing the sentence for the offence punishable under section 201 of the Indian Penal Code.

(v) Muddemal Property i.e. Article Nos. 1 to 27-A and the remaining property shall be preserved for a period of six months.

(vi) Copy of the judgment shall be given free of cost to the accused Anil alias Raju Namdev Patil immediately.

(D.G. DESHPANDE, J.)

(V. M. KANADE, J.)

. After pronouncement of the order, the learned counsel appearing on behalf of the accused applies for stay of the sentence for a period of 12 weeks.

. The sentence is stayed for a period of 12 weeks.

(D.G. DESHPANDE, J.)

(V. M. KANADE, J.)